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NO. 89-1159

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1989

DANIEL FERRIS — Petitioner

versus

COMMONWEALTH OF KENTUCKY — Respondent

ON PETITION FOR A WRIT OF CERTIORARI
TO THE CIRCUIT COURT
OF CAMPBELL COUNTY KENTUCKY

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Did the Kentucky courts correctly allocate the burdens of production and persuasion where a criminal defendant moves to suppress the use of a prior conviction to enhance his punishment in a subsequent criminal prosecution?

II. Did the Kentucky courts correctly consider the fact that petitioner was represented by counsel on the prior conviction he subsequently sought to suppress in the subsequent criminal proceeding?

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OPINION BELOW

The Opinion of the Campbell County Kentucky Circuit Court is correctly set forth in slip form in the petitioner's Appendix to his Petition.

JURISDICTION

The jurisdictional facts presented by the petitioner are correct.

CONSTITUTIONAL PROVISIONS INVOLVED

Petitioner correctly states the constitutional provisions involved.

COUNTERSTATEMENT OF THE CASE

The petitioner, Daniel Ferris, entered a conditional plea of guilty in the Campbell County Kentucky District Court to the offense of driving under the influence of alcohol in violation of Kentucky Revised Statute 189A.010(2)(c) after the state District Court declined to suppress the use of two prior guilty pleas to driving under the influence which were used to enhance his sentence. Petitioner then exercised his appeal as a matter of right to the Campbell County Kentucky Circuit Court which affirmed the state District Court on June 1, 1989. The Court of Appeals of Kentucky subsequently declined petitioner's invitation to grant a discretionary review of the decision of

the Campbell County Circuit Court on August 8, 1989. The Supreme Court of Kentucky thereafter refused to review the decision of the Court of Appeals of Kentucky on October 11, 1989.

Undeterred, petitioner then filed his petition for a writ of certiorari to the Campbell County Circuit Court with this Court.

COUNTERSTATEMENT OF THE FACTS

On October 5, 1988 the petitioner, Daniel Ferris, was apprehended by police officers of the Fort Thomas Police Department who charged him with operating his automobile under the influence of alcohol in violation of Kentucky Revised Statute 189.010(2)(c) and operating a motor vehicle while having a suspended operator's license in violation of Kentucky Revised Statute 198A.090. In the proceedings before the Campbell County District Court the respondent, the Commonwealth of Kentucky, sought to try petitioner as a third time driving under the influence offender and, accordingly, enhance his sentence on the most

recent drunken-driving offense according to the provisions of Kentucky Revised Statute 189A.010(3).[1]

Petitioner, in an attempt to suppress the use by the respondent of his two prior guilty-plea based drunken driving convictions, submitted an affidavit "whereby he averred that he had made the prior pleas without having been informed of his right to a jury trial, the right to cross-examine witnesses, the right to use the subpoena power of the court, the right to remain free from self-incrimination, and without being informed that the convictions could be used against him to enhance the penalty should he receive additional convictions within five years." (Petition, p. 6).

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[1]KRS 189A.010(3) provides: "For a third or subsequent offense within a five (5) year period, [the individual shall] be fined not less than $500 nor more than $1,000 and shall be imprisoned in the county jail for not less than 30 days nor more than 12 months and may, in addition to fine and imprisonment, be sentenced to community labor for not less than 10 days nor more than 12 months."

The Campbell County District Court, relying upon the procedure set out by the Supreme Court of Kentucky in Dunn v. Commonwealth, 703 S.W.2d 874 (Ky. 1985), cert. denied, 479 U.S. 832 (1986), held that the mere filing of the conclusory affidavit failed to satisfy the burden of production petitioner was required to satisfy that in fact his prior guilty pleas were constitutionally defective. Further, the state District Court noted that petitioner had been represented by counsel when he entered his prior pleas of guilty.

On appeal to the Campbell County Circuit Court the decision of the inferior state trial court was affirmed. Specifically, the state circuit court held that petitioner had, indeed, failed to satisfy his burden of production under Dunn, supra and, in any event, that his conclusory claim he had not been advised of his rights was insufficient based upon Corbett v. Commonwealth, 717 S.W.2d 831 (Ky. 1986), (prior conviction properly utilized

where accused represented by counsel and no claim made that he was ignorant of his rights).

Thereafter, both the Court of Appeals of Kentucky and the Supreme Court of Kentucky declined petitioner's attempt to obtain further state court review of the decision of the Campbell County District Court.

Additional facts shall be developed, as warranted, in the argument section of this brief.

ARGUMENT

I. THE KENTUCKY COURTS CORRECTLY ALLOCATED THE BURDENS OF PRODUCTION AND PERSUASION WHEN PETITIONER SOUGHT TO SUPPRESS THE USE OF HIS PRIOR DRIVING UNDER THE INFLUENCE CONVICTIONS TO ENHANCE HIS SENTENCE IN THE SUBSEQUENT CRIMINAL PROSECUTION.

Petitioner contends that the rule set out by the Kentucky high court in Dunn v. Commonwealth, 703 S.W.2d 874 (Ky. 1985), cert. denied, 479 U.S. 832 (1986) is "simply invalid" and that this Court should, therefore, issue a writ of certiorari to review the state court proceedings in this case. The Commonwealth of

Kentucky disagrees. The Supreme Court of Kentucky in Dunn, supra, allocated the respective burdens of production and persuasion in suppression hearings, where an accused challenges the use of a prior conviction in subsequent prosecution under Kentucky's habitual criminal statute, Kentucky Revised Statute 532.080. The precise holding of the Kentucky Supreme Court was as follows, Dunn, supra at 876:

> In those cases in which the defendant is indicted as a persistent felony offender and files a proper motion to suppress any evidence of his prior offenses, the burden is on the Commonwealth to prove the judgment of conviction in each of the underlying offenses upon which it intends to rely. The presumption of regularity of judgment shall be sufficient to meet the original burden of proof. After the judgments of conviction are introduced, the burden shifts to the defendant to show any infringement of his rights or irregularity of procedure upon which he relies, such as those set out in Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed. 2d 274 (1969), or other pertinent cases. If the defendant presents evidence, through his testimony or

> other affirmative evidence, which refutes the presumption of regularity, the burden then falls to the Commonwealth to prove that the underlying judgments were entered in a manner which did, in fact, protect the rights of the defendant. A silent record simply will not suffice.

The procedure set out by the state court in Dunn, supra is also applicable to prosecutions under the driving under the influence statute where the Commonwealth intends to rely on earlier convictions in seeking the enhancement of any possible sentence. Ratliff v. Commonwealth, 719 S.W.2d 445 (Ky.App. 1986).

While a panel of the United States Court of Appeals for the Sixth Circuit, in a 2-1 decision, has opined that "the methodology and standards utilized by the Kentucky Supreme Court do not comply with federal standards for determining whether a plea of guilty is intelligent and voluntary for purposes of the United States Constitution," Dunn v. Simmons, 877 F.2d 1275, 1279 (6th Cir. 1989), cert. denied, ___ U.S.L.W. ____ (U.S. March 26, 1990)

(No. 89-707), the Commonwealth's position in this case is the same as that taken in Dunn v. Simmons, supra - namely, that the Kentucky procedure passes constitutional muster.

Kentucky's imposition of a burden of production upon a criminal defendant attempting to suppress a prior guilty plea based conviction in a later criminal proceeding is consistent with the principles set out by this Court in Patterson v. New York, 432 U.S. 197, 201-202 (1977):

> It goes without saying that preventing and dealing with crime is much more the business of the States than it is of the Federal Government, Irvine v California, 347 US 128, 134, 98 L Ed 561, 74 S Ct 381 (1954) (plurality opinion), and that we should not lightly construe the Constitution so as to intrude upon the administration of justice by the individual States. Among other things, it is normally "within the power of the State to regulate procedures under which its laws are carried out, including the burden of producing evidence and the burden of persuasion," and its decision in this regard is not subject to proscription under the Due Process

> Clause unless "it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." Speiser v Randall, 357 US 513, 523, 2 L Ed 2d 1460, 78 S Ct 1332 (1958); Leland v Oregon, 343 US 790, 798, 96 L Ed 1302, 72 S Ct 1002 (1952); Snyder v Massachusetts, 291 US 97, 105, 78 L Ed 674, 54 S Ct 330, 90 ALR 575 (1934). [emphasis added]

The Kentucky procedure simply requires a defendant, having avoided the burden of trial and often having received a sentence less than the maximum possible by entering a plea of guilty, to come forward with some sort of evidentiary basis to support his motion to suppress a presumptively valid conviction based on an earlier guilty plea. No fundamental notions of justice are offended by the Kentucky procedure.

Kentucky's procedure is consistent with what was written in Loper v. Beto, 405 U.S. 473, 480 n. 6 (1972) in discussing the obligation a criminal defendant bears to substantiate an allegation that his constitutional rights were violated in a prior criminal proceeding:

> * * * "[T]he Court of Appeals * * * did not rest its decision on a finding that the petitioner had failed to meet his burden of proving the invalidity of the prior convictions. It reached the merits of the legal question involved, and we granted certiorari to review that decision. There is thus no basis in the record upon which we may either dismiss this case or affirm the decision below on the ground that the petitioner did not meet his burden of proving that the prior convictions were invalid. See Burgett v. Texas, 389 U.S. 109, 114-115, 19 L.Ed.2d 319, 324, 88 S.Ct. 258; Losieau v. Sigler, 406 F.2d 795, 803; Williams v. Coiner, 392 F.2d 210, 212-213"

The Kentucky procedure is consistent with this statement from Loper v. Beto, supra, and the cases cited therein. The Kentucky procedure simply requires the accused to do what is required in the federal courts when the constitutional validity of a prior conviction is contested - present evidence to overcome the presumption of regularity. United States v. Chrans, 869 F.2d 1084, 1087 (7th Cir. 1989) (defendant bears burden in habeas corpus proceeding to prove waiver of jury trial not freely

and intelligently made); Robards v. Rees, 789 F.2d 379, 385 (6th Cir. 1986) (petitioner bears burden of producing evidence that he was not represented by counsel); Luna v. Black, 772 F.2d 448 (8th Cir. 1985) (where accused introduces evidence that prior conviction constitutionally infirm, burden shifts back to government to prove otherwise).

The Kentucky procedure does not permit the prosecution to satisfy its burden of persuasion by invoking a presumption. It simply requires that before the prosecution is forced to assume a new burden of persuasion, as to what has been a presumptively valid plea, a defendant must produce some evidence to support his claim of noncompliance with Boykin v. Alabama, supra. The Kentucky Supreme Court specifically cautioned that once the defendant satisfies his burden of production "[a] silent record simply will not suffice." Dunn, supra at 876.

The procedure under attack by petitioner is consistent with the approach taken by several of Kentucky's sister states. In People v. Sumstine, 687 P.2d 904 (Calif. 1984) the California Supreme Court held that a criminal defendant would be required to produce evidence that his Boykin rights were infringed when he sought to suppress the use of a prior conviction in a subsequent sentence enhancement hearing, Sumstine, supra at 913:

> Yet the silence of the record is not entirely without relevance. When a defendant has made allegations sufficient to justify a hearing, the court must conduct an evidentiary hearing in the fashion set forth in Coffey: "[T]he prosecutor shall first have the burden of producing evidence of the prior conviction sufficient to justify a finding that defendant 'has suffered such previous conviction.' (Pen.Code, § 1025.) . . . [W]hen this prima facie showing has been made, the defendant shall thereupon have the burden of producing evidence that his constitutional [Boykin/Tahl rights were] infringed in the prior proceeding at issue. . . . [I]f defendant bears this burden, the prosecution shall have the

> right to produce evidence in rebuttal." [Fn. omitted.) (67 Cal.2d at p. 217, 60 Cal.Rptr. 457, 430 P.2d 15.) The state at first need prove only the fact of the prior conviction, but once the defendant has produced evidence tending to show his constitutional rights were infringed, it will not be sufficient rebuttal for the state to simply invoke the regularity of the silent record.

The Kentucky procedure and the one set out in Sumstine, supra, are virtually identical. See also, State v. Triptow, 770 P.2d 146 (Utah 1989); State v. O'Neil, 580 P.2d 495 (N.M.App. 1978); State v. Annino, 613 P.2d 84 (Or.App. 1980). In fact, at least two states place the burden of proving the unconstitutionality of a prior conviction upon the defendant. People v. Harris, 61 N.Y.2d 9, 459 N.E.2d 170 (1983); Disheroon v. State, 687 S.W.2d 332, 334 (Tex.Cr.App. 1985).

The rule of law announced by the Supreme Court of Kentucky concerning the burdens of production and persuasion in suppression hearings is in conformity with prior decisions

of this Court and with the decisions of several of Kentucky's sister states. The holding of the Kentucky Supreme Court concerning the burdens of production and persuasion were correct and were properly applied in this case by the state courts.

II. THE KENTUCKY COURTS PROPERLY CONSIDERED THE FACT THAT PETITIONER WAS REPRESENTED BY COUNSEL ON HIS PRIOR CONVICTIONS HE SUBSEQUENTLY SOUGHT TO SUPPRESS.

Petitioner concedes that when he pled guilty to driving under the influence in 1984 and 1985 "that he was both times represented by counsel." (Petition, p. 15). The Campbell County Circuit Court, in reviewing petitioner's appeal to that court, concluded that petitioner had failed to produce evidence which overcome the presumption of regularity of the prior pleas. Nevertheless, the Circuit Court went on to note "that the District Court specifically found that counsel in each action was well qualified and presumed that the appellant

[petitioner] had been informed of his rights." (Petition Appendix, 2a). The state court expressly relied on Corbett v. Commonwealth, 717 S.W.2d 831 (Ky. 1986) wherein the Supreme Court of Kentucky rejected an attack on a prior guilty plea which was supported by evidence that the accused was represented by counsel at all prior procedures and where the defendant made no claim he was ignorant of his rights. Given the fact that petitioner's affidavit simply recited that "no one informed him of the rights he relinquished by pleading guilty.", (Petition, p. 15), and that there was no dispute petitioner was actually represented by counsel, the state courts correctly declined to suppress the prior 1984 and 1985 convictions.

The law, as it should, presumes that defense counsel explains the nature of the crime in sufficient detail so as to give the accused notice of that to which he is being asked to admit. Henderson v. Morgan, 426 U.S. 637

(1976); Marshall v. Lonberger, 459 U.S. 422 (1983). Petitioner's suppression motion was correctly denied in the state trial court since the law will presume that petitioner had been informed by counsel of the nature of that which he was pleading guilty and the absence of any claim that in fact petitioner did not know of the rights he was foregoing by entering a plea of guilty. The affidavit offered by petitioner simply averred that he had not been informed of the rights he was foregoing by entering a plea of guilty and not that he was in fact ignorant of those rights when he entered his plea. Petitioner was provided a full and fair opportunity to come forth with evidence that would demonstrate that his prior pleas were something less than freely, voluntarily and intelligently entered. North Carolina v. Alford, 400 U.S. 25 (1970). The state courts properly considered that petitioner had been represented by counsel at his prior guilty pleas.

CONCLUSION

The petition for a writ of certiorari should be DENIED.

Respectfully submitted,

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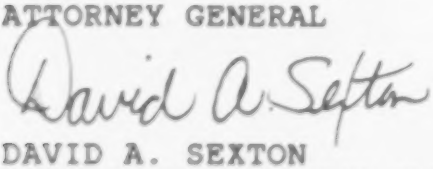

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